In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-306

UNITED VAN LINES, INC.,
Petitioner,

vs.

KARL VONDER LINDEN and His Wife, CAROL VONDER LINDEN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

United Van Lines, Inc., the petitioner herein, prays that a Writ of Certiorari issue to review the Decision of the Supreme Court of the State of New Mexico issued in the above entitled action on May 9, 1978.

OPINION BELOW

The opinion of the New Mexico Supreme Court is not reported. It is appended hereto in Appendix B. The decision of the District Court of the County of Socorro, New Mexico, which was affirmed by the New Mexico Supreme Court is not reported. It is appended hereto in Appendix B.

JURISDICTION

The decision of the New Mexico Supreme Court was entered on May 9, 1978 (Appendix B). The order denying the petitioner's motion for a rehearing was entered on May 26, 1978 (Appendix B). The Jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Where an interstate common carrier has issued a bill of lading for an interstate shipment of household goods and upon which the shipper has entered a released value upon rates based upon value selected set forth in the applicable tariff, may a court impose liability on the carrier for damages to those goods on a theory of liability other than as established in Title 49, U.S.C. Section 20(11) and deprive the carrier of its rights to limit liability and to remove the case from state court to federal court in contradiction of Title 49, U.S.C. Section 20 (11) and Title 28, U.S.C. Section 1445 (b).

2. In the absence of fraud or deceit by an interstate common carrier's agents or employees, may a court impose full liability rather than the liability as limited by the bill of lading upon the carrier by its failure to deliver a booklet entitled "Summary of Information for Shippers of Household Goods" (BOp 103) and failure to deliver the Order for Service to the shippers prior to the move as those items are further defined and required under Interstate Commerce Commission Regulations, 49 C.F.R. 1056.7 and 1056.9, where the shippers had been informed of the different rates to value their goods and where the shippers had previously received BOp 103 in a move three years earlier.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions involved, all of which are set forth in Appendix A, are:

28 U.S.C. Section 1257 (3)

28 U.S.C. Section 1337

28 U.S.C. Section 1441 (a) and (b)

28 U.S.C. Section 1445 (b)

49 U.S.C. Section 20 (11) (commonly referred to as Carmack Amendment)

49 U.S.C. Section 319

49 C.F.R. 1056.7

49 C.F.R. 1056.9 (a) and (b)

STATEMENT OF THE CASE

This lawsuit was brought to recover damages for a constructive total loss of Vonder Lindens' household goods which were being shipped with the petitioner under an interstate bill of lading from New Mexico to California. The goods were damaged by fire of an unknown origin occurring in the trailer containing the goods, which was owned by petitioner's agent Albuquerque Moving and Storage Co.[1] The fire occurred approximately 50 miles from the Vonder Lindens' residence in New Mexico shortly after the petitioner received the goods on August 27, 1973.

The lawsuit was brought after the parties failed to agree on the value to which the Vonder Lindens were

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1. Albuquerque Moving and Storage Co. was a co-defendant but all claims as to it were dismissed at the close of the trial on liability (Tr. 156).

entitled for the loss of the goods, although only 50% of the goods were damaged. The petitioner offered to pay the released value of $1.25 per pound or $12,937.50 for the entire shipment, while the Vonder Lindens demanded $81-82,000 (Tr. 275).

The trial court entered judgment against the petitioner for the full value of the goods denying the carrier the limitation of liability authorized by Title 49, U.S.C. Section 20 (11) and set forth in the bill of lading. The trial court's decision is appended hereto in Appendix B. The basis of the trial court's denial of the limitation of liability rested with the finding that the shippers had not been afforded a reasonable opportunity to choose between a higher and lower value of their goods in that the petitioner had failed to comply with the following I.C.C. regulations:

a. 49 C.F.R. 1056.7 as the petitioner failed to give the Vonder Lindens a copy of the booklet entitled Summary of Information for Shippers of Household Goods (BOp 103).

b. 49 C.F.R. 1056.9 as the petitioner failed to give the Vonder Lindens a copy of the Order for Service prior to the move.

Although the petitioner admitted that the Vonder Lindens had not been provided with a copy of BOp 103 or the Order for Service prior to the 1973 move the petitioner disagreed with the interpretation of the applicable I.C.C. regulations and their application of those regulations to the facts of this case.

The additional factual details are outlined below upon which the petitioner bases its petition for a writ of certiorari:

1. Mr. Vonder Linden released the value of the goods by inserting $.60 per pound on the bill of lading at the

time the petitioner received the goods (Tr. 284). At the time he signed the bill of lading he was informed of its purpose (Tr. 285).

2. The Vonder Lindens were informed of the various rates by which they could choose the value of their goods by the agent (Tr. 86, 24).

3. The Vonder Lindens had agreed to the released value of $1.25 per pound prior to the bill of lading being issued:

a. The Vonder Lindens had moved with the petitioner three years earlier using an agent in California to arrange the move from California to New Mexico in 1970 (Tr. 227, 541).

b. The move in 1970 was at the released value rate of $1.25 per pound (Tr. 544).

c. The Vonder Lindens contacted the same California agent to arrange the 1973 move from New Mexico to California under the same terms as the 1970 move (Tr. 227, 248, 288).

d. The Vonder Lindens informed the California agent that the released value was $1.25 per pound in 1970 (Tr. 317).

e. Due to time limitations and fear of the mail service, the California agent signed the Order for Service on behalf of the Vonder Lindens and inserted a released value of $1.25 per pound as per the Vonder Lindens' instructions (Tr. 319).

f. Prior to signing the Order for Service the California agent received verbal authorization to sign it from the mother of Mrs. Vonder Linden, who resided in California near the agent and who had the authority to act on her daughter's behalf (Tr. 228-229, 319-320).

g. Subsequent to the loss, Mrs. Vonder Linden's mother with the knowledge of Mrs. Vonder Linden confirmed the telephone conversation and the authority of the agent to sign the Order for Service in writing (Tr. 548, 246-247).

h. Subsequent to the loss, Mrs. Vonder Linden confirmed the agreement of a valuation of $1.25 per pound in writing with the petitioner (Tr. 549).

i. At all times prior to the loss, the Vonder Lindens intended to ship their goods at $1.25 per pound (Tr. 248).

4. After the loss, the petitioner agreed to the released value of $1.25 per pound rather than the $.60 per pound inserted on the bill of lading by mistake on the part of Mr. Vonder Linden.

5. The Vonder Lindens refused the petitioner's offer to pay $1.25 per pound or $12,937.50.

6. The Vonder Lindens would not have selected a lump sum value of $82,000 as demanded after the loss because:

a. They did not know the value of their goods prior to the move in 1973 (Tr. 249, 276).

b. It took them nine months to determine the actual value of their goods and to submit a claim for the full amount (Tr. 249, 275).

c. They were both surprised at the actual value of their goods of $82,000 (Tr. 249, 276).

7. The Vonder Lindens had acknowledged receipt for BOp 103 for the 1970 move (Tr. 544).

8. The bill of lading which Mr. Vonder Linden signed and upon which he inserted the released value of $.60 per

pound, set forth the three methods of releasing the value as provided under the tariff (Tr. 558). However, Mr. Vonder Linden claimed he never read the bill of lading prior to signing it, for although he had a Ph.D. in Geology (Tr. 267) he was not accustomed to reading things before he signed them (Tr. 278), and even though he was informed at the time he signed it that he was signing "insurance papers" and he was to select the "insurance" coverage (Tr. 285).

9. The Vonder Lindens had made arrangements with the petitioner's agent prior to the 1973 move to ship on credit as the employer of Mr. Vonder Linden would pay for the move (Tr. 252).

10. The Vonder Lindens filed suit in state court for compensatory damages of $83,621.48 on the theory of negligence and not common carrier liability and the complaint alleged inter alia that:

a. the petitioner was an interstate carrier;

b. the goods were damaged in an interstate shipment; and

c. a copy of the bill of lading was attached to the complaint (Tr. 1-7).

11. Although the complaint's theory of liability was negligence, the petitioner attempted to remove the case from the state court to federal court on the basis that the action had been pre-empted by federal law, Title 49, U.S.C. Section 20 (11), the Carmack Amendment (Tr. 13-29).

12. The federal court remanded the case on the arguments of the Vonder Lindens that they were proceeding solely in negligence and that there existed no federal question nor did any statute need to be construed, interpreted or enforced which would give rise to a federal question (Tr. 42, 44).

13. At the close of the Vonder Lindens' case-in-chief, the petitioner moved to dismiss on the ground that the Vonder Lindens had failed to prove a prima facie case of negligence (Tr. 344).

14. The trial court denied the motion on the assurance of the Vonder Lindens that they were proceeding on common carrier liability (Tr. 355).

15. The petitioner objected to any such amendment of the theory of liability without the petitioner being granted the right to be in federal court (Tr. 344-356).

16. At the close of the trial on liability[2] the petitioner filed its second petition for removal to federal court on the basis that the Vonder Lindens had amended their theory of a cause of action to common carrier liability and *ergo* one under the Carmack Amendment (Tr., 133-142).

17. The federal court remanded the case on the statements of the Vonder Lindens that there had been no change in the theory of liability of their case and that they were still proceeding solely in negligence upon which basis the federal court had previously remanded the action (Tr. 148, 128, 150).

18. The state court entered judgment against the petitioner on the grounds of common carrier liability after the petitioner had stipulated to the value of the goods for the purpose of taking an appeal on liability (Tr. 169).

19. The New Mexico Supreme Court affirmed the trial court and by such affirmation failed to acknowledge the application, force and effect of the Carmack Amendment and the petitioner's rights to have the matter heard in a federal forum and to limit its liability (Appendix B).

2. The trial had been bifurcated as to the issues of liability and damages. The trial court had heard only the evidence on liability prior to the motions and petition for removal further described in paragraphs 16 and 17 above.

REASONS FOR GRANTING THE WRIT

1. The New Mexico Supreme Court's decision is directly contrary to the law on liability of common carriers as decided by the United States Supreme Court in *Adams Express Co.* v. *Croninger,* (1912) 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314 and *Peyton* v. *Railway Express Agency,* (1941) 316 U.S. 350, 86 L.Ed. 1525, 62 S.Ct. 1171.

2. The New Mexico Supreme Court by imposing liability on an interstate common carrier on common carrier liability without recognizing a federal question or being controlled by the Carmack Amendment eliminates the uniformity of common carrier liability established by the Carmack Amendment as interpreted by this Court and is directly contrary to the case law of the United States Supreme Court and other federal courts.

3. The New Mexico Supreme Court by denying an interstate common carrier the right to limit liability under its bill of lading and the applicable tariff for non-compliance with the I.C.C. regulations in the absence of fraud or deceit by the carrier's agents or employees, is directly contrary to the case law of the United States Supreme Court and other federal courts.

4. The failure of the New Mexico Supreme Court to follow the precedent established by the United States Supreme Court on common carrier liability denied the petitioner its rights to limit its liability by established principles of law and its right to have the matter decided in a federal forum, both of which rights have been specifically granted by the Congress of the United States and are fundamental rights under federal law.

ARGUMENT

The uncontroverted facts establish that the present litigation arose from an interstate shipment under a bill of lading issued by the petitioner and upon which the Vonder Lindens had released the value of their goods upon rates established under the applicable tariff and dependent upon the value selected by the Vonder Lindens. The Vonder Lindens intended to ship at a released value of $1.25 per pound and although Mr. Vonder Linden released the value on the bill of lading at $.60 per pound, the petitioner voluntarily agreed to the value of $1.25 and this is the rate for which the Vonder Lindens were charged.

I. The New Mexico Supreme Court Decision Is Directly Contrary to the Federal Statutes and the Decisions of the United States Supreme Court.

Under the uncontroverted facts of this matter, the New Mexico Supreme Court's decision (Appendix B) imposing liability on the petitioner, an interstate common carrier by motor vehicle, and deciding that there exists no federal question is directly contrary to Title 49, U.S.C. Section 20 (11), commonly referred to as the Carmack Amendment, which is made applicable to the petitioner by Title 49, U.S.C. Section 319. Quite clearly under the decisions of the United States Supreme Court, the Carmack Amendment has pre-empted or superseded all other laws of the individual states, by court decision or otherwise, given the operative facts which are uncontroverted herein. *Adams Express Co.* v. *Croninger*, (1912) 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314; *Peyton* v. *Railway Express Agency*, (1941) 316 U.S. 350, 62 S.Ct. 1171, 86 L.Ed. 1525; *Missouri Pacific Railways* v. *Elmore and Stahl*, (1964) 377 U.S. 134, 84 S.Ct. 1142, 12 L.Ed.2d 194.

Furthermore, the decision of the New Mexico Supreme Court failing to acknowledge the application, force and effect of the Carmack Amendment, denies the carrier the removal of a case brought in a state court to the federal court under the fundamental right granted by the Congress of the United States in Title 28, U.S.C. Sections 1337, 1441 (a) and (b), and 1445 (b). Given solely the allegations of negligent non-delivery the United States Supreme Court has held that the case is removable as it raises a federal question under the Carmack Amendment. *Peyton, supra*, 316 U.S. at 350.

The petitioner on two separate occasions attempted to remove this case to federal court on the allegations set forth in the complaint (Tr. 1-7) and the statements made by the Vonder Lindens to the trial court (Tr. 355) pursuant to the specific authority granted by Congress and the precedent set out above. On both occasions, the removal was successfully prevented by the Vonder Lindens' statements to the federal court that their theory of liability rested solely on negligence; whereas the trial court was informed that they were proceeding on common carrier liability. The New Mexico Supreme Court, in attempting to give credence to the Vonder Lindens' conflicting arguments before the two courts, established a cause of action without precedence and has contradicted the federal statutes and the decisions of this Court.

As a result of the New Mexico Supreme Court's decision, the shippers and carriers are returned to the morass of the law existing prior to the Carmack Amendment. No longer may a shipper or a carrier be assured that "the congressional action has made an end to this diversity, for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transactions," *Adams Express Co., supra*, 226 U.S. at 505.

II. The New Mexico Supreme Court Erred in Denying the Petitioner the Right to Limit Its Liability Under the Tariff and Bill of Lading for Non-Compliance With I.C.C. Regulations in the Absence of Fraud or Deceit.

The Vonder Lindens did not offer nor was there any evidence of fraud or deceit by the petitioner or its agents or employees. They did not request a finding of fraud or deceit by the petitioner from the trier of fact (Tr. 151-153). The trial court's decision, affirmed by the New Mexico Supreme Court, which denied the limitation of liability as agreed by the parties on the bill of lading and other documents, was for the sole reason that the petitioner had failed to give the Vonder Lindens a copy of the Order for Service and the booklet entitled "Summary of Information for Shippers of Household Goods" (BOp 103) in violation of I.C.C. regulations, 49 C.F.R. 1056.7 and 1056.9. However, the trial court and the New Mexico Supreme Court by affirmation, failed to acknowledge the fact that the Vonder Lindens had been informed of the various methods for selecting a value on their shipment (Tr. 86, 24), and the law established by this Court and the other federal courts.

An interstate common carrier and the shipper in interstate commerce may limit the liability of the carrier for any damage, loss, or injury of the goods, provided that the limitation is strictly for the value of the goods and not against the negligence of the carrier. Furthermore, this limitation may only be permitted where the carrier has established by a properly approved tariff various rates which are dependent upon the value selected by the shipper, Title 49, U.S.C. Section 20 (11); *Peyton, supra.*

It is uncontested that the petitioner issued the bill of lading or the contract for the interstate shipment and that

the Vonder Lindens had released the value of the shipment. Furthermore, the rates of carriage were dependent on the valuation selected by the shipper under the applicable tariff (Tr. 570, p. 58). In order for the court to impose full liability on the petitioner after the contract had been entered, the court found that the Vonder Lindens had not been given a reasonable opportunity to select the valuation as agreed by the parties. As all of the facts clearly showed the contrary, the trial court denied the limitation of liability on the sole basis of non-compliance with the I.C.C. regulations.

As stated in the statement of the case, the Vonder Lindens had selected the rate of $1.25 per pound and informed the petitioner's agent of this rate (Tr. 317). This selection was based upon the previous move between these parties (Tr. 544), and not on the actual value of the goods, which the Vonder Lindens did not know (Tr. 249, 276). Furthermore, the Vonder Lindens had been informed of the various methods of selecting the valuation (Tr. 86, 24), and if Mr. Vonder Linden had read the bill of lading prior to signing it (Tr. 285), he would have been further informed (Tr. 558). Mr. Vonder Linden was informed he was signing a contract and specifically that he was signing what the driver called "insurance papers" upon which he was instructed to select the coverage (Tr. 285).

The United States Supreme Court recognized the purpose and propriety of permitting an interstate carrier and a shipper to limit a carrier's liability, prior to the specific grant under the Carmack Amendment, in *Adams Express Co.* v. *Croninger, supra.* The Court stated that: "the inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value

of the property transported." 226 U.S. at 509. The Court went on to say that: "neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss." 226 U.S. at 510.

On the basis of those principles, the courts had been cognizant of the fact that the released value permitted by the Carmack Amendment, should be upheld unless there is a showing of fraud or deceit by the carrier. This requirement of fraud or deceit was recognized in *Adams Express Co. supra,* 226 U.S. at 511, when this Court stated that: "It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld."

Subsequently, the other federal courts in deciding this issue have recognized that basic principle. The Eighth Circuit Court of Appeals has gone so far as to state that "in the absence of fraud, willful misconduct of carrier's employees does not vitiate value declaration." *Rocky Ford Moving Vans, Inc.* v. *U. S.*, (8 C.C.A., 1974) 501 F.2d 1369.

In the leading case involving the failure to give BOp 103 the Sixth Circuit Court of Appeals decided that: where the carrier fails to give BOp 103, the shipper has not been given a written cost estimate, the carrier's agent did not advise the shipper of the various valuation rates, the carrier's agent assured the shipper that the rate the agent selected provided sufficient coverage, and the agent inserted the valuation in the bill of lading, the carrier could not rely on the released value. *Brannon* v. *Smith Dray Line and Storage Co.*, (6 C.C.A., 1972) 456 F.2d 260. Although the case involved non-compliance with the Carmack Amendment, i.e. the shipper had not released the value in her own writing on the bill of lading, the case

nevertheless recognizes the principle that in order to vitiate the limitation of liability provision on the bill of lading, there must be fraud or deceit and reasons other than mere non-compliance of the I.C.C. regulation by failing to give BOp 103.

As to the failure to give the order for service to the Vonder Lindens prior to the move, the New Mexico courts have imposed significance on this fact such as the I.C.C. had not even contemplated. The specific regulation, 49 C.F.R. 1056.9 does not even require that the released value be inserted on that form (Appendix A). There was no allegation by the Vonder Lindens that the California agent had not acted within his authority. In fact, to the contrary, the agent as authorized, had completed the form according to the instructions of the Vonder Lindens and had inserted the released value according to those instructions, on petitioner's form permitting the released value to be inserted. It was the Order for Service and the agreement between the California agent and the Vonder Lindens prior to the loss by which the petitioner agreed to modify the value from that set forth on the bill of lading.

The trial court and the New Mexico Supreme Court by affirmation have in effect abolished the federal law of common carrier liability without any legal precedence and contrary to the federal statutes and the decisions of the United States Supreme Court. The decision sought to be reviewed by this requested writ of certiorari permits a shipper to agree, with full disclosure and without fraud or deceit, and select a cheaper rate of transportation and after a loss impose liability on the interstate carrier for the full actual value without compensating a carrier commensurate with the risk involved.

The long established principles of interstate common carrier liability of both the Congress of the United States

and the United States Supreme Court have been eroded in one decision by the New Mexico Supreme Court. The decision affects all shippers and common carriers within New Mexico and potentially throughout the United States by no longer providing those involved in interstate commerce with the knowledge that their actions shall be governed and controlled by the supreme law of the land set forth in the federal statutes and interpreted by this Court.

CONCLUSION

For the reasons stated and the arguments set forth, the petitioner respectfully asks this Court to grant the Writ of Certiorari to review the decision of the New Mexico Supreme Court.

Respectfully submitted,

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APPPENDIX

APPENDIX A

28 U.S.C. § 1257 (3):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the Validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 1337:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U.S.C. § 1441 (a) and (b):

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United

States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1445 (b):

A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 20 of Title 49 [49 USC § 20], may not be removed to any district court of the United States unless the matter in controversy exceeds $3,000, exclusive of interest and costs.

49 U.S.C. § 20 (11):

Any common carrier, railroad or transportation company subject to the provisions of this part [§§1-5, 5b-15a, 16, 17-23, 26, 27 of this title] receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common

carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulation applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury notwithstanding any limitation of liability or recovery or representation or

agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this part to regulate commerce, as amended [§ 10 of this title]; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: Provided further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: Provided further, That all actions brought under and by virtue of this Paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which

the defendant carrier operates a line of railroad: Provided further, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice and provided further, That for the purposes of this paragraph and of paragraph (12) the delivering carrier shall be construed to be the carrier performing the linehaul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: And provided further, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this part [§§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title] provided.

49 U.S.C. § 319:

The provisions of section 20(11) and (12) of part I of this Act [§ 20(11), (12) of this title], together with such other provisions of such part [§§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title] (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.

49 C.F.R. 1056.7:

Except as otherwise provided herein, each carrier of household goods shall cause to be given to every prospective shipper the summary of information set forth in form

BOp 103 and obtain a receipt therefor (§ 1003.1 of this chapter). If no personal interview is had with a prospective shipper, the carrier shall cause form BOp 103 to be delivered to the shipper and obtain a receipt therefor prior to the day on which the order for service is placed. Such receipt shall be preserved as a part of the record of shipment, if the shipment is subsequently accepted by the carrier. For the application of this section the owner of the household goods to be shipped, or his representative, shall be deemed to be the shipper. The requirements of this section shall not apply in those instances where the carrier has actual notice that the shipper has previously received form BOp 103.

49 C.F.R. 1056.9:

(a) Order for service required. Every motor common carrier shall, prior to receipt of a shipment of household goods, prepare an order for service which contains the following minimum information:

(1) Shipper's name, address, and telephone number.

(2) Consignee's name, address, and telephone number.

(3) Name, address, and telephone number of the carrier's delivering agent or, if the shipment is to be interlined, the name, address, and telephone number of the delivering carrier.

(4) Agreed pickup date and agreed delivery date, or in lieu of specific dates, the agreed period or periods of time within which pickup, delivery, or the entire move, will be accomplished.

(5) The location of the certified scale to be used in weighing the shipment at origin.

(6) Shipper's contacts, en route, if any, and at destination.

(7) Complete description of special services ordered.

(8) Any identification or registration number assigned the shipment by the carrier.

(9) Amount of estimated charges and method of payment of total tariff charges.

(10) Maximum amount required to be paid in cash, certified check, or money order to relinquish possession of a c.o.d. shipment.

(11) Whether shipper requests notification of charges as provided in §1056.-8(d) and the address at which such communication will be received.

(b) Signatures required; waiver of shipper's signature. The order for service shall be signed by the shipper or his representative who is ordering the service, and by the carrier or its agent; the requirement of the shipper's signature shall apply to all orders for service except where there is both an agreement for the extension of credit by the carrier and a written waiver of such requirement signed by the shipper or his representative. A copy of the order for service shall be dated and furnished the shipper or his representative at the time it is executed.

APPENDIX B

STATE OF NEW MEXICO
COUNTY OF SOCORRO
IN THE DISTRICT COURT

No. 16-847

KARL VONDER LINDEN and CAROL VONDER LINDEN, his wife,
Plaintiffs,

-vs-

UNITED VAN LINES, INC., et al.,
Defendants.

JUDGMENT

(Filed July 1, 1977)

THIS MATTER having come on before the Court with the Court having heard the testimony of the witnesses and having viewed the evidence and having entered its Findings of Fact and Conclusions of Law and the parties having stipulated as to the amount of damages suffered by the Plaintiffs,

IT IS HEREBY ORDERED, ADJUDGED that the Plaintiffs be and they hereby are granted judgment against the Defendant UNITED VAN LINES in the amount of $51,000.00, plus costs incurred herein.

IT IS FURTHER ORDERED that the Plaintiff's Complaint against ALBUQUERQUE MOVING AND STORAGE be and the same is hereby dismissed with prejudice,

the Court having found in favor of Albuquerque Moving and Storage.

/s/ Edmund H. Kase III
District Judge

Approved As to Form
/s/ Charles E. Barnhart
Attorney for Plaintiffs
/s/ James P. Reichert
Attorney for Defendant United Van Lines

STATE OF NEW MEXICO
COUNTY OF SOCORRO
IN THE DISTRICT COURT

No. 16-847

KARL VONDER LINDEN and CAROL VONDER LINDEN, his wife,
Plaintiffs,

vs.

UNITED VAN LINES, INC., a foreign corporation, and ALBUQUERQUE MOVING AND STORAGE COMPANY, a New Mexico Corporation,
Defendants.

DECISION OF THE COURT

This matter having come on for hearing, the Court, having heard the testimony of the witnesses and the evidence and arguments of counsel, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That the Court has jurisdiction of the parties to and the subject matter of this action.

2. That Defendant United Van Lines is a foreign corporation qualified to do business in New Mexico as an interstate carrier and regulated by the Interstate Commerce Commission.

3. That Defendant Albuquerque Moving and Storage is a New Mexico corporation with its principal place of business in Albuquerque, Bernalillo County, New Mexico.

4. That on August 27, 1973 Plaintiffs shipped 10,350 lbs. of their household goods, professional publications, and other possessions from Socorro, New Mexico to Palo Alto, California via Defendant United Van Lines with Defendant Albuquerque Moving and Storage Company acting as Defendant United Van Lines' local agent.

5. That all of Plaintiffs' goods were delivered to Defendants in good condition on August 27, 1973.

6. That Plaintiffs' shipment was tendered to Plaintiffs by United Van Lines in Palo Alto, California with only 5,080 lbs. having arrived, all of which was damaged except for certain goods taken from the shipment by Plaintiffs at Albuquerque, New Mexico on or about August 31, 1973.

7. That Plaintiffs requested by telephone to Ted Tanner, an agent for Defendant United Van Lines, that Defendant United Van Lines move Plaintiffs' goods from Socorro, New Mexico to Palo Alto, California.

8. That at no time prior to the moving of Plaintiffs' goods did Defendant United Van Lines, or any of its agents, furnish to Plaintiffs a copy of Form BOp 103, as required by I.C.C. Regulation 1056.7.

9. That at no time prior to the moving of Plaintiffs' goods did Defendant United Van Lines, or any of its agents, have actual notice that Plaintiffs had previously received a copy of Form BOp 103 incident to a move in 1970 from Stanford, California to Socorro, New Mexico via Defendant United Van Lines.

10. That Plaintiffs received their copy of the Order for Service from Ted Tanner after the arrival of the shipment in California, contrary to I.C.C. Regulation 1056.9.

11. That Defendant United Van Lines did not comply with the statutory requirements which would have enabled Defendant United Van Lines to limit its liability for damages to Plaintiffs' goods.

12. That Plaintiffs were never afforded a reasonable opportunity to choose between higher and lower rates for service based on valuation by Plaintiffs of Plaintiffs' goods.

13. That Defendant United Van Lines presented no proof to show that the damage to Plaintiffs' goods were as a result of (a) an act of God, (b) an act by a public enemy, (c) an act of the shipper, (d) an act by a public authority, or (e) the inherent vice or nature of the goods.

14. That Defendant United Van Lines presented no proof that Defendant United Van Lines, or its agents, were free from negligence.

15. That Defendant United Van Lines cannot rely on a pamphlet Plaintiffs found in their possessions left over from a shipment of household goods by Defendant United Van Lines in 1970, entitled "Important Notice to Shippers of Household Goods", as being notice to Plaintiffs of their options for service and as being in compliance with I.C.C. Regulation 1056.7 for the shipment in August 1973.

CONCLUSIONS OF LAW

1. That the Court has jurisdiction of the parties to and the subject matter of this action.

2. That Defendant United Van Lines is liable to Plaintiffs on the basis of common carrier liability for the full amount of loss and damages to Plaintiffs' goods in an amount to be determined by the Court in a subsequent proceeding.

3. That Defendant Albuquerque Moving and Storage Company is not liable to Plaintiffs.

/s/ Edmund H. Kase III
District Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 11,597

KARL VONDER LINDEN and CAROL VONDER LINDEN, his wife,
Plaintiffs-Appellees,

vs.

UNITED VAN LINES, INC., a foreign corporation, and ALBUQUERQUE MOVING AND STORAGE COMPANY, a New Mexico corporation,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

DECISION

(Filed May 9, 1978)

The jurisdiction is concurrent. A federal question is not involved in this matter. The use of federal law by a state court which precludes the defendant from limiting its losses when in noncompliance therewith does not create a federal question. We find substantial evidence to affirm the trial court's decision.

IT IS SO ORDERED.

/s/ Dan Sosa, Jr.
Dan Sosa, Jr., Justice

We Concur:

/s/ John B. McManus, Jr.
John B. McManus, Jr., Chief Justice

/s/ William R. Federici
William R. Federici, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Friday, May 26, 1978

NO. 11,597

KARL VONDER LINDEN and CAROL VONDER LINDEN, his wife,
Plaintiffs-Appellees,

vs.

UNITED VAN LINES, INC., a foreign corporation, et al.,
Defendants-Appellants.

(Received May 30, 1978, Gallagher & Casados, Socorro County)

This matter coming on for consideration by the Court upon Motion of Appellants for a rehearing, and the Court having considered said motion and brief of counsel and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that Motion of Appellants for rehearing be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-306

UNITED VAN LINES, INC.,
Petitioner,

vs.

KARL VONDER LINDEN and His Wife,
CAROL VONDER LINDEN,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-306

UNITED VAN LINES, INC.,
Petitioner,

vs.

KARL VONDER LINDEN and His Wife,
CAROL VONDER LINDEN,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

OBJECTIONS TO QUESTIONS PRESENTED

1. The Respondents object to the questions presented as set forth in the Petition on the grounds that:

a) The questions are not posed by either the law or the facts of the case;

b) Neither of the questions presented are part of this action; and

c) The questions were presented, considered, and rejected by the New Mexico District Court and the rejection affirmed by the New Mexico Supreme Court.

d) The questions as set forth by the Petitioner attempt to inject interpretation of the statutes rather than simply applying the law of the case to the facts as was done by the New Mexico courts.

OBJECTIONS TO STATEMENT OF THE CASE

The Petitioner recites, beginning on the bottom of page 4 of his petition, "additional factual details" none of which were found by the Court, and all of which beg questions of fact.

Facts as found by the Court are set forth in the transcript beginning on page 154 and are further set forth on page A10, A11 and A12 of the Petition.

Respondents further object to the Statement of the Case on the grounds that the statement sets forth argument rather than statements of fact.

REASONS FOR DENYING WRIT

1. The decision of the New Mexico Supreme Court was a correct application of the common law of common carriers, federal statutes, and decisions of the United States Supreme Court and did not involve the validity, construction or enforcement of a federal statute.

2. The New Mexico Supreme Court was correct in its decision denying the Petitioner the right to limit its liability because of Petitioner's violation of ICC regulations.

3. Title 49 U.S.C. Section 20 (11) is merely a codification of the common law of common carriers. *Secretary of Agriculture* v. *U. S.*, Utah 1956, 76 S.Ct. 244, 350 U.S. 162, 100 L.Ed. 173; *Missouri Pacific Railways* v. *Elmore & Stahl*, Texas 1964, 84 S.Ct. 1142, 377 U.S. 134, 12 L.Ed. 2d 752, rehearing denied 84 S.Ct. 1880, 377 U.S. 984, 12 L. Ed. 2d 752.

4. Title 49 U.S.C. Section 20 (11) does not confer original, exclusive jurisdiction on the federal district court

but recognizes within the four corners of the statute state court jurisdiction by requiring actions brought in state courts to be brought in states in which defendant carriers operate. State courts and federal courts have concurrent jurisdiction in cases against carriers for damages to goods. 13 C.J.S. 507; 14 Am.Jur.2d 114.

5. Title 28 U.S.C. Section 1337 is not applicable in the case at bar in that there was no federal questions involved. The mere existence of the questions of federal law somewhere within the controversy is not enough for removal. *Eickhof Construction Co.* v. *Great Northern Railway Co.*, D.C. Minn. 1968, 291 F. Supp. 144.

ARGUMENT

I. The New Mexico Supreme Court's Decision Was Not Contrary to the Federal Statutes and Decisions of the United States Supreme Court.

The Petitioner attempted on two different occasions to remove the matter to federal district court. Once on the allegations set forth in the complaint (Tr. 1-7), and once on a statement which the Petitioner took as an amendment to the pleadings. The relevant testimony in this matter is the statement made to the trial court when counsel for the Respondents was asked by the Court:

> ". . . the plaintiff is proceeding apparently on the theory of common carrier liability. Is that correct?"

to which counsel for the Respondents answered:

> "Yes." (Tr. 355)

Such a statement certainly does not constitute an amendment of pleadings, and in no way changed the Respon-

dents' theory of the case, which was brought and tried on negligence to which the law of common carriers was correctly applied by both New Mexico District and Supreme Courts. Their decisions were in accord with the requirement that controversies between carriers and shippers be determined by applying federal rules and regulations and the common law, as codified in Title 49 U.S.C. Section 20 (11). *New Hampshire Fruit and Produce Co.* v. *Hines,* 1922, 116 Atl. 243, 97 Conn. 255; *Galveston H & SA Railway Co.* v. *Wallace,* 32 S.Ct. 205, 223 U.S. 481, 56 L.Ed. 516; *Nelms, Kehoe and Nelms* v. *Davis,* D.C. Texas 1921, 277 F. 982; *Deaver-Jeter Co.* v. *Southern Railway Co.,* (1913) 79 S.E. 709, 95 S.C. 485.

In order to invoke the jurisdiction of the federal district court, there must be a question as to the validity, construction or enforcement of laws regulating interstate commerce, none of which were present in the case at bar. *Adams* v. *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers,* 262 F.2d 835 (C.A. Kan. 1959); *Strachman* v. *Palmer,* 82 F. Supp. 161, D.C. Mass. 1949.

II. The New Mexico Supreme Court Was Correct in Holding That the Petitioner Could Not Limit Its Liability Due to Non-Compliance With ICC Regulations.

The Petitioner argues that the New Mexico Supreme Court erred in failing to uphold the release value of $1.25 per pound since there was no showing of fraud, deceit or willful misconduct on the part of the carrier. Such a statement is contrary to law.

On July 20, 1973, Mr. Tanner, agent for the Petitioner, prepared the order for service (Tr. 315) and signed the Vonder Lindens' name on or about July 23, 1973 instead

of having one of the Vonder Lindens sign the order (Tr. 318) in violation of Title 49 C.F.R. Section 1056.9 (b). The carrier did not deliver a copy of the order for service to the shipper until after the goods had been moved from Socorro, New Mexico to Palo Alto, California (Tr. 329) in violation of Title 49 C.F.R. 1056.9 (a). The carrier's agent did not have a waiver of the shippers' signatures in writing, which is in violation of 49 C.F.R. 1056.9 (b).

The carrier knew what was required by ICC regulations and willfully failed to comply.

In order for a declaration of value by a shipper to be binding, the shipper must be provided with a genuine opportunity to choose between higher and lower rates based upon valuation of the goods. *Caten* v. *Salt Lake City Movers and Storage, Inc.,* 149 F.2d 428 at 432 (1945)

The burden of full liability for damaged goods is placed on the carrier unless the carrier shows that he has fully complied with the statutory requirements for limiting his liability. *Thomas Electronics, Inc.* v. *H. W. Tayton Co.,* D.C. Penn. 1967, 277 F. Supp. 639; *Rhoades* v. *United Airlines, Inc.,* 340 F.2d 481, 486; *New York NH and HR Co.* v. *Nothnagle,* 346 U.S. 128 at 135, 73 S.Ct. 986, 97 L.Ed. 1500 (1953); *Clubb* v. *Hetzel,* 165 Kan. 549, 198 P.2d 142; *Brannon* v. *Smith, Dray Line and Storage,* (6th Cir. 1972) 456 F.2d 260.

The carrier's driver testified that he explained nothing ever happened to him and told the Vonder Lindens that 60¢ per pound is what the Government used on their shipments (Tr. 190); that the insurance amount was blank when he received the papers (Tr. 190); and that he never handled anything over $1.25 per pound (Tr. 211). Mr. Vonder Linden testified that he was instructed by the driver to show 60¢ per pound (Tr. 285). The record is

void of any testimony indicating that either of the Respondents had a reasonable opportunity to evaluate the insurance alternatives and make a decision.

The Petitioner would urge the Court that the Respondents having a copy of a booklet entitled "Information to Shippers", which was given them in 1970 by an agent of the carrier for another move, fulfills the requirements of Title 49 C.F.R. Section 1056.7, which requires a copy of the booklet BOp 103 "to be given every prospective shipper . . . and obtain a receipt therefor prior to the day on which the order for service is placed". The facts are uncontroverted that the carrier's agent who wrote the order did not give the shipper a copy of BOp 103. It is uncontroverted that the driver, who had never seen a copy of BOp 103 before trial time, did not give the plaintiffs a copy of BOp 103. Failure to supply the shipper a copy of BOp 103 was a direct violation of Title 49 C.F.R. 1056.7 and the carrier's attempt to relate back the plaintiffs' possession of the booklet entitled "Information to Shippers" received in a move three years earlier, before BOp 103 was required, fails because of remoteness of time as it relates to this movement of goods. Any attempt on the part of the carrier to limit its liability contravenes a strong public policy expressed in the common law and codified in Title 49 U.S.C. Section 20 (11). *Chandler* v. *Aero Mayflower Transit Co.*, 374 F.2d 129 (1967) at 135.

The Court's attention is called to the fact that the proceeding before the New Mexico District Court was a proceeding for the purpose of establishing whether or not the carrier was liable to the shipper with the element of damages to be tried at a later date in the event the Court found liability. On July 11, 1977, six months after trial as to liability, the parties stipulated that the loss of the Respondents was, in fact, $51,000.00 (Tr. 169), for which loss the Petitioner was tendering the sum of $12,937.50.

There is no rule of law or equity which would allow such a patently unjust result in light of the numerous flagrant admitted violations of ICC regulations by the carrier.

The true question here is, who will bear the $51,000.00 loss of the shippers' goods due to their destruction while in transit by the carrier? The shippers who entrusted their goods to United Van Lines, Inc. for safe movement, or the carrier who violated virtually every ICC regulation that would have informed the shippers of their rights before placing the order for service? Any court, state or federal, would decide the case the same on the facts of the case and the applicable law.

CONCLUSION

The Petitioner has set forth no questions of fact or law which would warrant this Court granting a Writ of Certiorari to review the decision of the New Mexico Supreme Court. The Respondents pray the Court deny the Petition of United Van Lines, Inc. for a Writ of Certiorari.

Respectfully submitted,

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